

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CRI-2018-090-002637  
[2019] NZDC 6580**

**MARITIME NEW ZEALAND**  
Prosecutor

v

**THE RED BOATS LIMITED**  
Defendant

Hearing: 12-15 February 2019  
Appearances: S Lowery for the Prosecutor  
N Beadle and J MacGibbon for the Defendant  
Judgment: 9 April 2019

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**RESERVED JUDGMENT OF JUDGE N J SAINSBURY**

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[1] On an evening in June 2017 Tevita Kava attended a birthday party held on a vessel cruising on Auckland harbour. He fell from the vessel, when a ramp he was leaning against gave way. He drowned. His death should not have happened.

[2] This case is about who is responsible for Mr Kava's death. His family and friends expect and deserve an answer to that question. So too do the operators of the vessel. So too does the community, who have an interest in understanding the cause of the untimely death of one of our fellow citizens.

[3] This decision does not provide the full answers that it should to the question of how Mr Kava's death came to happen. That is because the evidence presented to the

Court did not address issues that it could and should have covered. The result is that I cannot say with sufficient certainty how this event happened and who is to blame for it. That is unfair to the memory of Tavita Kava, it is unfair to the loved ones of Tavita Kava and it is unfair to the defendant company and its staff.

[4] I now turn to the reasons I have reached this conclusion.

[5] The Red Boats Limited ("Red Boats") is a fishing, cruising and charter company based in Auckland. One of the vessels it operates is called the *Reo Moana*. On 3 June 2017, the *Reo Moana* had been hired out by a group celebrating a 30<sup>th</sup> birthday. There were approximately 50 guests on the vessel that night. After a cruise around the inner harbour, the vessel slowed down so that food could be cooked on an onboard barbecue.

[6] The barbecue is located at the rear of the vessel on what is called a "duckboard". The duckboard extends from the stern of the vessel by approximately one metre. It has a metal railing at approximately waste height. In addition to being used as the location for the barbecue, the duckboard is also the main point of passenger entry and exit from the vessel.

[7] There is a hinged ramp, made of aluminium and bolted to the duckboard, that can be raised and lowered to allow access on to and off the vessel from an adjacent wharf or pontoon. Passengers coming on to the vessel would walk over the ramp on to the duckboard and then up some stairs on to the main deck of the *Reo Moana*. Once all passengers were on the vessel, the ramp would be raised and bolted into position. When raised, the ramp forms a barrier that becomes part of the railing surrounding the duckboard.

[8] When the *Reo Moana* was on a harbour cruise, passengers were not allowed on to the duckboard. That area could be blocked off from the main deck of the vessel by a wooden partition that would slide into place making a solid barrier along the stern at the rear of the outer saloon. If that was not in place, then a chain could be put across the opening.

[9] The exception to the rule against passengers being on the duckboard was for passengers who were operating the barbecue. In that case one or two designated passengers would be allowed on the duckboard for the purposes of cooking the food. This restriction was not due to any lack of strength of the duckboard. It is securely attached to the hull of the vessel. Rather it is due to the hazard of the barbeque itself, particularly as the duckboard is a comparatively small area that would quickly become crowded and cramped.

[10] As some point during the cruise on 3 June 2017, Tevita Kava made his way on to the duckboard. He was not one of the designated persons operating the barbecue. While on the duckboard, he leaned up against the raised ramp. Notwithstanding the ramp being held in place by a bolt, it collapsed backwards. As a result, Mr Kava fell into the sea, with tragic consequences.

[11] Red Boats, as the operator of the *Reo Moana*, have been charged under ss 36(2), 37(1), 48(1) and (2)(c) of the Health and Safety at Work Act 2015. The allegation in the charging document reads that Red Boats failed “to ensure, as far as reasonable practicable, that the health and safety of other persons was not put at risk from work carried out as part of the conduct of the business or undertaking”. In addition, or in the alternative, the charging document reads that Red Boats failed “to ensure, as far as reasonable practicable, that the workplace, the means of entering and entering the workplace, and anything arising from the workplace, were without risks to the health and safety of any person”. The result of either or both failures was that they exposed an individual, in particular Mr Kava, to the risk of death or serious injury.

[12] The charging document sets out particulars of two failings, either of which the prosecution says would be sufficient to prove the charge. First, that there was an inadequate system in place to ensure that the ramp did not collapse. Second, that there were inadequate systems in place to ensure that passengers who were not authorised to do so, did not go onto the duckboard. As the case unfolded, the focus really became on the first of these particulars, ie why was it that the ramp collapsed causing first Mr Kava, and later Mr Nathan Tuva, to fall into the harbour.

[13] Having heard evidence over four days from witnesses both for the prosecution and for the defence, I allowed counsel to make closing submissions.

[14] The prosecution case was that the evidence established that the ramp had given way for one of two reasons.

(a) Employee error in not properly securing the ramp; or

(b) A failure of the ramp itself.

[15] The Crown contention is that it can be proved beyond reasonable doubt that one of those two scenarios led to the death of Mr Kava. The Crown argument is employee error makes the defendant vicariously liable as it acts through its employees; that failure of the ramp is the responsibility of the defendant for not properly maintaining the ramp itself. The prosecution position is that if I am satisfied beyond reasonable doubt that the cause of Mr Kava's death can only be due to one of those two possibilities and that either possibility arises from fault by the defendant then I must convict the defendant.

[16] I agree with the prosecution proposition that if the cause of Mr Kava's fall from the vessel must be one of two or more alternatives then the defendant should be convicted if each available alternative involves fault of a type identified in the relevant sections of the Health and Safety at Work Act 2015. It does not matter in those circumstances that I cannot specify which alternative is the one that in fact applies. Against that, if there exists as a reasonable possibility an alternative explanation that does not involve fault by the defendant, as required in the relevant sections of the Act, then I must acquit.

[17] Mr Lowery, for the prosecution, submitted that there were four possible explanations for the accident. There were the two that he had already alluded to, employee error or fault in the ramp itself. In addition, there were two other possibilities in the case being:

- (a) Mr Kava caused the accident, either by intentionally throwing himself off the boat or by doing something to undermine the integrity of the ramp so as to cause himself to fall.
- (b) Some unknown third party has removed the bolt from the ramp so that it was no longer secure.

[18] The prosecution argument is that I can reject these latter two possibilities as lacking any evidential foundation.

[19] I accept the underlying premise of Mr Lowery's argument that the law draws a clear distinction between scenarios that are theoretically possible and scenarios that support a reasonable possibility. In any criminal case it is possible to imagine many theoretical possibilities that might, on the face of it, be an answer to a charge. But theoretical possibilities of themselves can never amount to a defence. What turns a theoretical possibility into a reasonable doubt is an evidential foundation. As the Court of Appeal has made clear in the guideline jury direction on reasonable doubt:<sup>1</sup>

“What then is a reasonable doubt? A reasonable doubt is an honest and reasonable certainty left in your mind about the guilt of the defendant after you have given careful and impartial *consideration to all of the evidence*.

In summary, if, after careful and impartial consideration of the evidence, you are sure that the defendant is guilty, you must find him or her guilty. On the other hand, if you are not sure that the defendant is guilty, you must find him or her not guilty.” [my emphasis]

[20] I agree with the prosecution submission that there is no evidential foundation that Mr Kava went off the vessel intentionally or that he interfered in any way with the locking mechanism on the ramp. At one point during the trial it appeared that the defence were advancing the proposition that Mr Kava somehow unbolted the ramp himself. After some discussion with counsel I note that defence counsel, sensibly, did not pursue this line of defence.

[21] I wish to make it very clear that there is no evidence whatsoever that Mr Kava in any way contributed to his falling off the vessel. While he did lean against the ramp,

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<sup>1</sup> *R v Wanhalla* [2007] 2 NZLR 573.

in the circumstances he had good reason to consider that that would be a sufficient support for him. The evidence that I heard made it clear that Mr Kava was in a very good mood that night. There was nothing about his demeanour, background or behaviour that would indicate that he would do anything to put himself in harm's way. Indeed, he was openly concerned about not falling off the vessel. If anything, he would have been vigilant and careful about not putting himself at risk of falling off.

[22] In the moments leading up to Mr Kava falling off the vessel he was under observation by Esser Tuvae. Mr Tuvae's evidence was clear that when Tavita Kava came down onto the duckboard area, he was under observation by Mr Tuvae through the entire time up until he fell in the water. It seems Mr Kava had slipped on the stair as he came down to the duckboard. Esser Tuvae caught him. They laughed about what had happened. Then Mr Kava went to light a cigarette or cigar. As he did that he put his back against the ramp at which point it collapsed. There is no evidence whatsoever of him doing anything that might have interfered with the integrity of the latching system for the ramp.

[23] I agree with Mr Lowery. There is no evidential foundation for the proposition that Mr Kava in any way contributed to what happened beyond innocently leaning on the ramp.

[24] The next option which the prosecution argues can be discounted for lack of evidential foundation is third party interference. This is the proposition relied upon by the defence as being reasonable possibility and accordingly an answer to the charge.

[25] I will start with the defence argument on this topic was set out in Mr Beadle's closing argument. He argued that the evidence before the Court showed that there was no employee error. To the contrary, the defence argued that the evidence indicated that the skipper, Samson Somers, properly and securely bolted the ramp in place before the vessel left the wharf. The defence also argued that the evidence before the Court indicated that when bolted in place the ramp was incapable of collapsing in the way experienced by Mr Kava and later by Mr Nathan Tuvae. If the bolt was in place, and if when in place the ramp could not collapse, Mr Beadle argues the only possible explanation left is that following the vessel leaving the wharf someone has unlatched

the ramp. Given the evidence does not support Mr Kava or Mr Tuvae having done it, then it must be some other unknown third party or parties who twice interfered with the latch.

[26] In support of this, the defence argument is that, having excluded employee error, inherent fault in the ramp and Mr Kava being responsible, the only available inference is that it was someone else on board that night who undid the latch on the ramp. The defence notes that at some point in the evening there were a number of people on the duckboard. This resulted in one of the crew having to tell those individuals to get off the duckboard as the numbers were more than those allowed. The defence argues that this means there was an opportunity for someone to unlatch the ramp. Whether that was done out of some form of malice, drunken curiosity or for motive unknown really does not matter. The defence position is that if this is a reasonable possibility then it means the defendant must be acquitted.

[27] In the light of those positions there are three matters I need to address.

- (a) Was there employee error. In other words, did Samson Somers initially fail to secure the ramp and/or did subsequently Bradley McKinley fail to secure the ramp after it collapsed the first time.
- (b) Is there some other reasonable possibility that might explain why the ramp collapsed? If the ramp was faulty was it a fault that the defendant was aware of or ought to be aware of. Against that, was it a fault that it was not reasonably practicable for the defendant to anticipate.
- (c) Is the possibility that a third party unlatched the ramp a reasonable one, so as to provide a defence or can it be excluded as lacking evidential foundation?

## **Employee error**

[28] As the evidence unfolded it was clear that employee error would be a crucial issue. While, for obvious reasons, the focus has been on the collapse of the ramp causing Mr Kava to fall in, there were the two incidents of the ramp collapsing. On the face of it each could be the result of employee error. I will address each in turn. The first being whether Samson Somers properly latched the ramp at the start of the cruise. The second being whether Bradley McKinley properly re-latched the ramp after Mr Kava fell in and before Mr Tuvae fell in.

[29] I start with Samson Somers. He was called to give evidence for the prosecution. He was the master of the vessel on the night in question. Although 18 years old at the time of this incident he had acquired his masters ticket. Red Boats is a family business. Samson Somers' father and grandfather have been involved in the business. He had grown up actively involved in helping in the family business. That experience explained why it was that he was able to get his master's ticket at such a young age.

[30] The evidence I heard, particularly from Samson Somers, Bradley McKinley, Sarah Zsadanyi and from Andrew Somers<sup>2</sup> presented a picture of Red Boats being a company that prioritised safety and training. Indeed, the prosecution did not dispute that Red Boats was a responsible company that complied with its obligations and took those obligations seriously.

[31] In his evidence Samson Somers described securing the boat ramp once all the passengers were on board. In answer to the question: "How did you secure the boarding ramp?" he stated:<sup>3</sup>

So I put the deadlock into the hole on the side of the ramp and then I leaned over and I tied the rope onto the handrail as well, double half hitch.

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<sup>2</sup> Samson Somers, Bradley McKinley and Sarah Zsadanyi were crewing the vessel that night and were called by the prosecution. Andrew Somers is a director of the defendant and was called by the defence.

<sup>3</sup> Notes of evidence page 12, line 15.



[32] Mr Somers went on to describe the way the latch worked so that once in place it would not accidentally come loose. He also noted that getting the latch into place needed some amount of effort as it was a snug fit. It was necessary to push it in and wiggle it.<sup>4</sup> While there was also a rope attached to the ramp, that was really used for pulling up the ramp from inside the boat. It was tied to the railing to keep it out of the way. The mechanism for keeping the ramp in place was the latch. The rope was not really intended as a means for keeping the ramp in place.<sup>5</sup>

[33] Mr Somers was 100% sure that he had properly secured the ramp.<sup>6</sup> Needless to say he was not challenged on that evidence by the defence.

[34] My assessment of Samson Somers was that he was a careful and mature young man who took his responsibilities as master of the vessel seriously. He had been brought up in an environment where safety was very much a priority. It was of interest to note that earlier on the day of this incident he had taken an opportunity while out on the water to hold an impromptu training exercise with the crew relating to emergency procedures. I had no reason to doubt the truthfulness of what he was saying.

[35] Notwithstanding all of that, it concerned me that the possibility remained that with all the best will in the world Samson Somers may have been distracted on that night. That having pulled up the ramp and tied it, his attention was diverted elsewhere before he had the chance to bolt the ramp shut. After all the ramp goes on to the duckboard which then goes into the outer saloon where at least a significant proportion of the 50 people on board would have been congregating. In that noisy excited atmosphere, the possibility of inadvertent distraction seemed a very real one.

[36] I need to acknowledge that a significant foundation for my concern was my assumption that in pulling up the ramp that Samson Somers was on board the vessel standing on the duckboard. I assumed that he then used the rope to pull up the ramp which is hinged on the edge of the duckboard. Having pulled it up by the rope and

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<sup>4</sup> Notes of evidence page 15, line 9 and page 17, line 10.

<sup>5</sup> Notes of evidence page 16, line 5.

<sup>6</sup> Notes of evidence page 17, line 1-31.

loosely secured the rope, he would then put the bolt into the ramp itself. Later in the trial, evidence arose, almost in passing, showing that my assumption was wrong.

[37] In fact, what happened is that Samson Somers walked out of the bridge of the *Reo Moana*, jumped immediately overboard onto the wharf and walked to the stern of the vessel where the ramp was connecting the duckboard to the wharf. While standing on the wharf he then picked up the ramp pushing it into the vertical position. Then from a position straddling the wharf and the vessel he bolted the ramp into place. Having done that from the wharf side of the ramp he leaned across it to tie up the rope. With the ramp in place he walked back along the wharf until adjacent to the bridge, where he jumped up on vessel, climbed over the railing and returned to the bridge. The obvious advantage of this manoeuvre is that he did not have to scramble through the passengers in the outer and inner saloons, congregating around the bar.

[38] The fact that this had happened in this way came up in the evidence of Andrew Somers. He was called by the defence. In answer to a question he mentioned that he had seen a video of the vessel leaving the wharf. Apparently, there were cameras around the wharf showing the scene that night. Mr Somers senior had viewed those some days after the event. One of them showed a comparatively close view. While I understand it is not close enough to specifically see the bolt being put into place, it did show Samson Somers doing something consistent with bolting the ramp. It turns out that that video has now been overwritten by the wharf authorities. That was notwithstanding a request for it to be preserved. Instead it turned out the wharf authorities had preserved another video of the same scene albeit from a longer range. It was possible to get that video and have it played in the course of this trial.

[39] The camera recording onto the video was too far away to show detail of the bolt being put into the ramp but what it does corroborate is this. It shows Samson Somers jumping off the boat from next to the bridge and walking to the back. It shows him picking up the ramp. It shows for approximately 11 seconds that he is doing something at the area of the ramp before heading back to the bridge. In other words, it is consistent with him bolting the ramp from the outside, tying up the rope and walking back.

[40] The reason that that is particularly important is that if he was securing the ramp from outside the vessel then the first priority is to get the ramp secure by putting the bolt in. There is no point trying to lean over the unsecured ramp to tie up the rope first. The danger of that is that you will have the ramp falling back on you.

[41] Accordingly, that video coupled with the evidence of Samson Somers convinces me that Samson Somers did properly secure the ramp. At the very least it establishes that as a reasonable possibility. To that extent the option of employee error in relation to the actions of Samson Somers is removed as a basis for a conviction being entered against the defendant.

[42] Turning now to Bradley McKinley. Was the ramp re-latched after the first collapse? The evidence surrounding that is that when the alarm was raised following Mr Kava falling overboard, Mr McKinley went to the back of the vessel. He saw that the ramp was dragging in the water. He was able to pull the ramp up. However, it was damaged so that the latch would not align with the hole in the ramp. He pulled the ramp forward and then slotted the latch so that the bolt was behind it.<sup>7</sup>

[43] While securing the ramp with the bolt behind it may not be as effective as securing an undamaged ramp by putting the bolt through the hole, it was on the face of it as good a fix that could be achieved. I accept Mr McKinley's evidence that he did latch the ramp in that way. The very fact that someone had gone overboard as a result of the ramp collapsing means it would be expected that Mr McKinley would be taking particular care about this.

[44] The evidence of Mr Andrew Somers and the photographs make it clear that it is possible to latch the ramp by putting the bolt behind it as Mr McKinley described. Accordingly, I do not accept that there was any error by Mr McKinley in latching the ramp in this way once it had collapsed in the water the first time.

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<sup>7</sup> Notes of evidence, page 67, line 1 to 29.

### **A faulty ramp and/or third party interference?**

[45] The issues of the ramp being faulty and third party interference with the ramp are inextricably linked. The reason being is that the argument in support of third party interference now comes down to two propositions being established. First, that there is an opportunity for some third party to interfere with the ramp and second, there is no fault with the ramp, which was fit for purpose and properly latched. That being so, then the only remaining explanation for the accident is third party interference.

[46] I accept that for the numerous people aboard the *Reo Moana* that night, at least some of them at some time would have been close enough to the ramp latch to interfere with it. That said, there is no evidence at all of anyone being seen to take an interest in the latch or to do anything untoward to it. There is no direct evidence of anyone having any interest or motive to interfere with the latch.

[47] Insofar as an argument can be advanced that third party interference is a reasonable inference, it is necessarily predicated on the proposition that the evidence establishes there is no fault with the ramp. Opportunity of interference alone would not form an evidential foundation for there being a reasonable possibility of third party interference.

[48] While I am yet to complete my reasons why I reject third party interference, at this point I wish to make the following very clear. I am particularly mindful that a finding of third party interference carries a serious insinuation of wrong doing against friends and family of the deceased who were on the *Reo Moana* that night. Such a finding should not be made or even implied without a proper evidential foundation. While in order to reach my decision, I must consider this issue, there is no evidence that casts any suspicion on any of the other guests on the *Reo Moana* that night. It is my conclusion that there is no evidence that any of them had any responsibility for the accident that happened.

[49] What really lies at the heart of this case is the issue of whether the ramp was faulty. Given that two people fell into Auckland Harbour when the ramp collapsed, it had seemed obvious, at least to me, that the issue of the condition of the ramp, and

whether or not it contributed to the accident, would be an important aspect of this case. Immediately following the events of 3 June 2017 that also appeared to be a view shared by the investigating authority and the defendant company.

[50] The defence called Andrew Somers, a director and shareholder of the defendant company, to give evidence. He confirmed that Maritime New Zealand were advised of the incident that happened on 3 June 2017. That was done next day.<sup>8</sup> On 6 June 2017, a Maritime New Zealand investigator, Tom Parsons, visited the *Reo Moana* to inspect the vessel. It appears from Mr Somers' evidence that Mr Parsons was familiar with The Red Boats' vessels, including the *Reo Moana* as he had undertaken an audit of the vessel the previous year as part of a procedure undertaken by Maritime New Zealand to ensure that vessels are operated safely.<sup>9</sup>

[51] Mr Andrew Somers gave evidence about the day that Tom Parsons came to first inspect the vessel after the accident. Prior to Mr Parsons arriving Andrew Somers said that he had tried to see if he could make the ramp collapse. At this point, because of damage to the ramp, the latch no longer lined up with the drilled hole in the ramp itself. However, it was possible to pull the ramp up and push the latch so that the bolt was behind the latch. That would prevent the ramp collapsing. Andrew Somers described how he tried to shake and push the ramp, putting his full weight against it. He could not make it collapse. He said that when Mr Parsons arrived, he also tried to see if he could make the ramp collapse. He also failed to achieve this.<sup>10</sup>

[52] It seemed that Mr Parsons wanted to remove the ramp, presumably so it could be tested. Due to the way in which the ramp was attached, it was not possible to remove the ramp with the vessel in the water. However, the vessel was due to be surveyed. For that purpose, it was taken to Whangarei where it was put on the hard. Mr Parsons met with Mr Andrew Somers in Whangarei on 13 June 2017. Mr Parsons gave evidence that again there were attempts to see if the ramp could be made to collapse by putting force on it with the bolt located behind the ramp. It was not possible to get the ramp to collapse. Further, the ramp had been placed in the upright

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<sup>8</sup> Notes of evidence, page 184, lines 25 to 35.

<sup>9</sup> This is referred to in the evidence as MOSS which means Maritime Operator Safety System.

<sup>10</sup> Notes of evidence, page 203, lines 7 to 20.

position with the latch behind it for the voyage from Auckland to Whangarei. The ramp remained in position without incident.

[53] The ramp was removed from the vessel in Whangarei. It was given to Mr Parsons. That was the last Mr Andrew Somers saw of the ramp.

[54] I also note that in the evidence of Mr Andrew Somers, he provided background information on where the ramp was manufactured and how it has operated. While some of this information provided interesting colour, it was not entirely useful. Apparently, the engineer who did the work is an old friend of the Somers' family and a JP. Fascinating as that may be, it is not as useful as perhaps evidence about the design, strength of the materials and anticipated life span. However, I do accept that Red Boats took care to have the ramp properly designed, built and installed. For the life of the ramp, however long that might have been, it has until the date of this incident, operated properly without giving any cause for concern.

[55] The obvious and bewildering aspect of all of this is that the boat has been fitted with a ramp that appears to have functioned as it should and yet on this evening, failed twice. For obvious and very proper reasons, Mr Andrew Somers was interested to know why this might be. His attempts to replicate what occurred shed no light on how the accident came about. It is not a criticism of Mr Andrew Somers in any way to observe that he was not undertaking a controlled scientific inspection of the ramp. Rather, he was attempting, in a very common sense way, to see if there was something obvious that might explain what happened.

[56] Clearly, what was required at this point is that the ramp would be subject to a rigorous analysis by an appropriate expert or experts. It would seem that was a view shared by Maritime New Zealand, at least at 13 June 2017. That being the date on which the evidence discloses that the Maritime New Zealand investigator, Mr Tom Parsons, asked that the ramp be removed and given to him.

[57] The fact that Maritime New Zealand were interested in getting expert opinion which might assist the Court in deciding how to this accident happened, is borne out by evidence that was produced to the Court in relation to the rope used to raise and

lower the ramp. I had the benefit of evidence from Ray John Allsopp, a testing technician of Auckland. He was engaged by the prosecution to test the rope. I received expert evidence about the condition of the rope and its breaking strength.

[58] It would seem that this evidence was provided on the basis that the rope might be a secondary safety mechanism that should prevent the ramp collapsing into the water in the event that the latch failed. If that was its intended purpose, then the rope was a very poor piece of equipment, unsuited for that purpose. As it turned out, the evidence revealed that the rope was never intended as a mechanism for holding the ramp in place. It was a convenient means of lifting and lowering the ramp and nothing more.

[59] One might have thought that briefing expert evidence in relation to the rope might give some indication of the rigour and thoroughness with which the investigation was to be carried out. Sadly, that is not correct.

[60] Mr Parsons did not give evidence in this trial. It seems that he left Maritime New Zealand around February 2018. The case was passed on to a new investigator. Although that individual had assisted with the investigation earlier, it was only in February 2018 that he took over from Mr Parsons.

[61] What remains unexplained, and in my view inexplicable and unacceptable, is the fact that the last time that the ramp features in this trial as a physical entity is when it was unbolted and handed to Mr Parsons on 13 June 2017. Was it tested? I do not know, there was no evidence about it. Was it subject to scientific analysis? I do not know, there was no evidence about it. As I understand it, the ramp has never been returned to Red Boats. In the absence of any detailed evidence on this topic, this is not a criticism of Mr Parsons. It may well be that he started on the path of getting the ramp tested but that got derailed after he left. Maybe the ramp was tested but the results went missing. I have no idea, because no one saw fit to put in front of me evidence that may have resolved this conundrum.

[62] At this point I return to first principles. It is for the prosecution to prove beyond reasonable doubt that the ramp was faulty and that the fault was one about which the

defendant should have known and should have taken steps to remedy. There are two competing pieces of evidence on this topic. First is the fact that on two occasions the ramp gave way. Against that is the evidence of Mr Andrew Somers that the ramp appeared fit for purpose, even after having been damaged following the first collapse. What was required in this case was a thorough scientific examination of the ramp to ascertain whether in fact it was at fault, and if so whether that was a fault of which Red Boats should have been aware. That has not happened.

[63] Mr Lowery, for the prosecution, gamely tried to get around this problem by referring me to the photographs of the damaged ramp.<sup>11</sup> He suggested that I could tell by looking at the photographs that there were problems with the way the ramp had been riveted to the hinge. He suggested that I could work this out by looking at the photographs as they show that the joins and rivets had deteriorated. He argued that there is discolouration in the metal which might help me with such an analysis. To be fair to Mr Lowery, I consider he was trying to do the best he could in a difficult, if not impossible, situation.

[64] I am not an expert in metallurgy or in the construction of ramps. It is not appropriate to make up for a deficiency in evidence to ask the Judge to guess based on some photographs. The Maritime New Zealand investigation and consequently the prosecution case was hopeless deficient on this crucial aspect of the case. Judicial speculation is not the panacea for investigatory inadequacy.

## **Conclusion**

[65] The only conclusion I can come to is that clearly something went wrong with the ramp, causing it to collapse twice. But there is no evidence to explain exactly what went wrong. It is the prosecution's obligation to provide that evidence to support its contention that the only reasonable possibility is that there was a fault in the ramp and that that fault was known or ought to have been known to the defendant.

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<sup>11</sup> Photographs 20 to 27 in the prosecution photograph book.



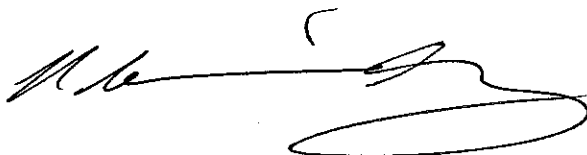
[66] It may be that the Crown contention is right that the ramp was faulty. But they have not proven that, even though the means of doing so was in their hands. Accordingly, the prosecution has not proven beyond reasonable doubt that there was a fault in the ramp for whom responsibility lies with the defendant.

[67] Even if the ramp was faulty, it may well be a situation where it is not a fault of which the defendant would or should have been aware. I note that the evidence has indicated that the vessel has passed surveys many times since the ramp was installed. There is no evidence of there ever having been a problem with the ramp in the past. There is no evidence that the defendant has ever been put on notice of there being a problem with the ramp. In the absence of evidence prosecution cannot exclude the reasonable possibility that the ramp, even if faulty, possessed a fault that the defendant did not know about and could not have reasonably known about.

[68] In the circumstances, the defendant company must be acquitted of this charge.

#### **Final observation**

[69] As I noted at the beginning of this decision, the result is unsatisfactory in so many respects. I understand that the circumstances of Mr Kava's death will need to be considered by a Coroner. As I understand it, the usual practice is to wait until criminal matters have finished before the coronial inquiry takes place. If that is the case, it may be possible for the Coroner to seek evidence regarding the ramp itself. I hope that the ramp has been preserved by Maritime New Zealand. It may mean that at this late stage a proper investigation happens to assist with the coronial inquest. That should have happened for this case.

A handwritten signature in black ink, appearing to read 'N J Sainsbury', with a long horizontal stroke extending to the right and a large loop at the end.

N J Sainsbury  
District Court Judge